1989

Sandy City v. Jerry Rooks : Brief of Respondent

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

SANDY CITY,	:	
Plaintiff/Respondent	:	
vs.	:	Docketing No. 890442 CA
Jerry Rooks,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

On Appeal from the Circuit Court, Salt Lake County, Sandy Department, State of Utah, the Honorable Robin W. Reese Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, AND ORDINANCES

OTHER SOURCES

JURISDICTION OF COURT OF APPEALS

Jurisdiction is conferred on the Court of Appeals in Section 78-2a-3 of the Utah Code.

NATURE OF THE PROCEEDINGS

This appeal is taken from a final judgment of criminal conviction on June 16, 1989 imposed after jury trial by the Third Circuit Court, Sandy Department, Honorable Robin W. Reese presiding.

STATEMENT OF THE ISSUES

I. WHETHER THE DEFENDANT'S BRIEF SHOULD BE STRICKEN BECAUSE IT FAILS TO COMPLY WITH RULE 24 OF THE RULES OF THE UTAH COURT OF APPEALS.

II. WHETHER THE DEFENDANT HAS STANDING TO CHALLENGE SECTION 3-1-14 FOR VAGUENESS WHEN HE HAS NOT DEMONSTRATED THAT THE ORDINANCE IS VAGUE AS TO HIS CONDUCT.

III. WHETHER SECTION 3-1-14 IS VOID FOR VAGUENESS.

IV. WHETHER THE TRIAL COURT PROPERLY ALLOWED THE DEFENDANT'S STATEMENT INTO EVIDENCE.

DETERMINATIVE CONSTITUTIONAL PROVISIONS STATUTES AND RULES

Revised Ordinances of Sandy City, Section 3-1-14.

> (a) Attacking dogs. It shall be unlawful for the owner or person having charge, care, custody or control [of] any dog to allow such dog to attack, chase, or worry any person, any domestic animal having a commercial value, or any species of hoofed protected wildlife, or to attack domestic fowl. Worry as used in this section shall mean to harrass [sic] by tearing, biting or shaking with the teeth.
>
> (b) Owner liability. The owner in violation of subsection (a) above shall be strictly liable for violation of this section. In addition to being subject to prosecution under subsection (a) above, the owner of such dog shall also be liable in damages to any person injured or to the owner of any animal(s) injured or destroyed thereby.
>
> (c) Defenses. The following shall be considered in

mitigating the penalties or damages or in dismissing the charge:

(1) That the dog was properly confined on the premises.

(2) That the dog was deliberately or maliciously provoked.

STATEMENT OF THE CASE

1. On January 27, 1989, Sandy City charged the defendant by Information with Dog Attacking Persons or Animals under Sandy City Ordinance 3-1-14.

2. The date of the violation was December 24, 1988. The transcript before the Court of Appeals contains no evidence concerning the events of that date nor any evidence of events previous to that date concerning the ownership of the dog.

3. After the date of violation but before the charge was filed, Diana Albrand, a Sandy City animal control officer, called the defendant and inquired as to a convenient time that a representative from animal control could come to the defendant's home or work to speak with him. Because of scheduling conflicts, the defendant agreed to come to the animal control office to fill out a statement. Transcript, p. 6,

4. When he arrived at the office, Diana Albrand told him that he was under no obligation to write the statement and clarified this position by giving the defendant a partial Miranda warning. The defendant was not placed under arrest and was free to leave at any time. Transcript, p. 6-7, 17.

5. The defendant told the officer that his dog had been

running between his residence and a Mrs. Mauldin's and then expressed confusion about what to write in the statement. The officer responded, "Just write what happened and, you know, who owns the dog and who doesn't own the dog." Transcript, p. 7.

6. The officer went into a back room to do other work while the defendant filled out the statement. When the defendant was finished writing the statement, he voluntarily handed it to the officer and, after the officer expressed appreciation, said "okay" and left. Transcript, p. 8.

7. The case first came before the trial court on March 16, 1989 for the defendant's motion to suppress the defendant's written statement. The Honorable Philip K. Palmer denied the motion.

8. The trial was heard by jury on June 16, 1989, the Honorable Robin W. Reese presiding. The jury found the defendant guilty and the judge ordered restitution.

SUMMARY OF THE ARGUMENT

1. The Brief of Appellant should be stricken under Rule 24 of the Rules of the Utah Court of Appeals. The brief contains a number of factual allegations which are not supported by citations to the transcript. Furthermore, a complete transcript of the proceedings would show that some of these allegations are inaccurate.

2. Even if the brief is not stricken, the defendant does not have standing to challenge Section 3-1-14 for vagueness. The litigant challenging a law must show that it is vague either in all its applications or at least as applied to the litigant's

conduct. The defendant has shown neither.

Subsection (b) of the ordinance states clearly that owners of dogs are strictly liable for a violation of subsection (a) which prohibits dogs from attacking persons or other specified animals. The ordinance is, therefore, not vague in all its applications. Furthermore, the defendant has not shown that the ordinance is vague as to his conduct because there are no facts appropriately before the court upon which the court could reach that conclusion.

3. Even if the defendant has standing to challenge the ordinance for vagueness, the ordinance is not vague. Subsection (a) gives notice to owners of a dog as well as people having charge, care, custody or control of a dog that they may not allow that dog to attack persons or animals. "Allow" is commonly understood to include passive conduct; it does not necessitate intent or knowledge.

The average person would understand from the language of the ordinance that he is responsible for the conduct of his dog regardless of whether he was aware of the activities of dog. Otherwise, the purpose of the ordinance to protect the public welfare would be defeated.

4. The written statement of the defendant was properly admitted by the trial court. The circumstances in which the statement was given were not subject to Miranda protections because they were neither custodial nor interrogative. The defendant came freely to the animal control office to give the statement, wrote the statement and offered it to the animal control officer freely,

and left the office freely.

ARGUMENT

I. THE BRIEF OF THE APPELLANT SHOULD BE STRICKEN BECAUSE IT IS DRAFTED IN VIOLATION OF RULE 24 OF THE RULES OF THE UTAH COURT OF APPEALS.

The Brief of Appellant contains a number of factual allegations which are not supported by references to the record. This is not a matter of a simple failure to cite to facts contained in the transcript. The transcript excludes entirely the evidence leading to and on the date of the violation. Nevertheless, the defendant, in his Statement of the Case and elsewhere in his brief, liberally alleges facts from the trial without offering the court the benefit of determining their accuracy. The only portion of the brief which cites to the transcript is the section on the admissibility of the defendant's statement. Brief of Appellant, p. 14-16.

Rule 24(k) of the Rules of the Utah Court of Appeals permits the court to strike briefs which are not drafted in compliance with the rules. The Brief of Appellant does not comply with Rules 24(a)(7) and 24(e) which require facts to be supported by the record. When facts alleged on appeal are not supported by citations to the record, the reviewing court will assume the correctness of the ruling below. White River Shale Oil v. Public Service Commission, 700 P.2d 1088 (Utah 1985).

Rule 24(k) also permits the court to strike briefs which contain inaccurate information. The defendant's version of the facts contains inaccuracies, but it is difficult for the plaintiff

to show these inaccuracies without the missing portions of the transcript. However, at least two examples of inaccuracy can be offered by way of the defendant's own written statement. Appendix 1.

The defendant states that he took his dog to animal control to be adopted or destroyed. Brief of Appellant, p. 4-5. This assertion is directly contrary to the defendant's own written statement that the dog "vanished" in September and then returned with a new collar and tag. Prosecution's Exhibit No. 7. The defendant also makes statements that leave an impression that after September the dog was with him only periodically. Brief of Appellant, p. 5. But these statements contradict the defendant's admission that at some point he had the dog for a month and a half and that after this time he never had a problem with the dog--apparently a problem with him leaving--until December 25th when he disappeared. Prosecution's Exhibit No. 7.

II. THE DEFENDANT DOES NOT HAVE STANDING TO CHALLENGE SECTION 3-1-14 FOR VAGUENESS BECAUSE HE HAS NOT DEMONSTRATED THAT THE ORDINANCE IS EITHER VAGUE IN ALL ITS APPLICATIONS OR VAGUE AS TO HIS CONDUCT.

A person engaging in conduct which is clearly proscribed by a law in question "cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." Village of Hoffman v. Flipside, Hoffman Estates, 455 U.S. 489 (1982). The litigant asserting vagueness has the burden of showing that the law in question is vague either in

all its applications or at least as applied to the litigant's conduct. Tribe, American Constitutional Law, Sections 12-32, at 1036 (2d ed. 1988).

The defendant has failed to show that the ordinance is vague in all its applications. The ordinance establishes clearly that an owner is strictly liable for a violation of the ordinance. Subsection (b) states that "the owner in violation of subsection (a) above shall be strictly liable under this section." Subsection (b) further clarifies that strict liability applies not only to damages but to prosecution for the offense itself:

> In addition to being subject to prosecution under subsection (a) above, the owner of such dog shall also be liable in damages to any person injured or to the owner of any animal(s) injured or destroyed thereby.

In at least one circumstance, therefore, the ordinance is entirely clear.

The defendant has also failed to show that the ordinance is vague as to his conduct. The transcript before the Court of Appeals excludes all testimony presented at trial. The record on appeal, therefore, is devoid of the facts which would allow the defendant to argue or the court to conclude that the ordinance is vague as to the defendant's conduct.

Even if the application of the ordinance is limited to owners and the court accepts the defendant's allegation that he was not the licensed owner of the dog at the time of the offense, the defendant has failed to establish that he was not the owner as that term is commonly understood. Therefore, he has not shown, nor are

there sufficient facts for the court to find, that he was not the owner of the dog and thus not subject to the clear language of subsection (b).

III. SECTION 3-1-14 IS NOT VOID FOR VAGUENESS BECAUSE SUBSECTION (A) BOTH BY ITS LANGUAGE AND PURPOSE IMPOSES STRICT LIABILITY ON OWNERS AND OTHERS HAVING CHARGE, CARE, CUSTODY OR CONTROL OF A DOG.

The central issue of this case is whether Section 3-1-14 is void for vagueness. All of the defendant's issues, except the one concerning the defendant's statement, can be answered by a resolution of the issue of vagueness.

The standard in Utah for determining whether a law is void for vagueness is that the law must be "sufficiently explicit and clear to inform the ordinary reader of common intelligence what conduct is prohibited." State v. Hoffman, 733 P.2d 502, 505 (Utah 1987). But in reviewing a law under this standard, the court must consider other important guidelines.

First, "legislative enactments are accorded a presumption of validity." Hoffman, at 505. Second, "neither absolute exactitude of expression nor complete precision of meaning can be expected." State v. Owens, 638 P.2d 1182, 1183 (Utah 1981). It is not a defense, therefore, that on hindsight there may be other constructions of the law in question.

Third, the degree of scrutiny with which a court considers a law depends on whether the law reaches constitutionally protected conduct. If its does, the degree of notice must be greater than for other conduct so that the there is no chilling effect on constitutionally protected activities. In such cases, the law is

subject to close judicial scrutiny. Colautti v. Franklin, 439 U.S. 379 (1979); Rotunda, Constitutional Law, Section 17.8, at 262, n. 22 (1986). Laws related to activities which are not constitutionally protected are subject to a less strict test for vagueness. Flipside, at 498.

Before examining the language contained in Section 3-1-14, it must be determined whether the law reaches constitutionally protected conduct. It does not. The purpose of dog control ordinances is to protect the public, not deprive one the right of property. McQuillan, Municipal Corporations, Section 24.284 (1989). The mere fact that a law tangentially affects property does not invoke close scrutiny. Otherwise, economic regulations would not be subject to a less strict vagueness test. Flipside, at 498; See also United States v. National Dairy Products, 372 U.S. 29, 36 (1963) (distinguishing the approach to a vagueness challenge in a case involving an economic regulation from the approach to cases arising under the First Amendment).

The rights with which courts are most concerned under a claim of vagueness are those specifically protected by the constitution. The concern for a law which regulates speech, for example, is that uncertainties in the law may chill one's right to freedom of speech. It can hardly be said that any unclarity regarding a person's responsibilities for restraining a dog produces a chilling effect on constitutional guarantees.

Section 3-1-14 is clear that the owner of a dog is strictly liable if that dog attacks, chases, or worries a person or animal

specified in the ordinance. The question is whether a person having charge, care, custody, or control of the dog is also strictly liable. An analysis of this question must focus on Subsection (a):

> It shall be unlawful for the owner or person having charge, care, custody or control [of] any dog to allow such dog to attack, chase or worry any person, any domestic animal having a commercial value, or any species of hoofed protected wildlife, or to attack domestic fowl.

Subsection (a), even without the clarification added by Subsection (b), is clear that people other than the owner, as specified in the ordinance, are strictly liable. The use of the word "allow" in subsection (a) does not leave confusion as to whether knowledge or intent is required. "Allow" means "to forbear or neglect to restrain." Webster's Ninth Collegiate Dictionary (1983).[1] "Allow," therefore, implies passive conduct, without the necessity of knowledge. This definition is apparent to the ordinary reader of common intelligence and such a reader would understand from the ordinance that he is responsible for the actions of his dog regardless of whether he had knowledge of those actions.

In Village of Northbrook v. Cannon, 377 N.E.2d 1208 (Ill. App. 1978), the defendant argued that the word, "permit," as used in a nuisance animal ordinance implied knowledge. The ordinance read: "It shall be unlawful for the owner or harborer of any dog, cat or other domestic animal to cause or permit such animal to perform,

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[1] This source cites the following as an example of how the word may be used: "[allow] the dog to roam."

create or engage in any nuisance . . . ." The city argued that the ordinance was malum prohibitum and that no proof of intent was required.

The case was decided not on the issue of vagueness but on the whether lack of knowledge was a defense. But the court made clear that the use of the words "permit" or "allow" did not necessary impose a requirement of intent. The court compared the ordinance in question to cases decided under state pollution control laws which used the word "allow" in relation to the release of pollutants.

In those cases, the Illinois courts held that no mens rea was required. In comparing the pollution cases to the animal control ordinance, the court said:

> Each measure focuses on prevention of a harmful result which may be caused by the action of a range of persons from by-standers to those holding legal title to the pollutant or animal whose release would adversely affect the environment. Accordingly, both make punishable passive activity by person who obtain some benefit from the continued existence of the harmful agent.

Id. at 1213.

Similarly, it is clear that 3-1-14(a) imposes strict liability on a person who owns or has charge, care, custody or control of a dog which attacks a person or animal. The defendant suggests that "allows" means "that the owner or person in control of that animal knows what the dog is doing and is in a position to prevent such activity." Brief of Appellant, p. 9. Under this interpretation, only those rare cases could be prosecuted where the defendant was present at the time of the attack or there was other evidence that

he or she intended the result. The ordinance would have little effect in compelling people to control the dogs for which they are responsible.

A reader of common intelligence would realize, therefore, not only by the common understanding of the word "allow" but by the obvious purpose of the ordinance, that the ordinance imposes strict liability. Any other reading would defeat the purpose of section 3-1-14, as well as animal control ordinances in general--to compel those having responsibility to properly restrain their dogs to avoid the threat to public welfare of dogs running at large. Section 3-1-14(a) makes this purpose clear to owners of dogs as well as others who have charge, care, custody or control of a dog.

Contrary to the defendant's position, intent is not an element of all criminal offenses. Malum prohibitum crimes do not require intent. Salt Lake City v. Ronnenburg, 674 P.2d 128, 129 (Utah 1983). These types of crimes are generally "enactments passed as police measures, regulating statutes, or statutes enacted for the protection of public morals, public health, and the public peace and safety." 22 C.J.S. Criminal Law, Section 30.

Factors which favor a strict-liability construction of a law are that the offense "creates a danger or probability of injury which will be the same without regard to intent; that an intent or scienter requirement would obstruct the purpose of the statute or make it difficult to enforce; and that the accused, even if he does not will the violation, is usually in a position to prevent it with no more care than society might reasonably expect." 21 Am. Jur.

2d, Criminal Law, Section 139. The ordinance in question fulfills each one of these criteria.

In summary, Section 3-1-14 is not void for vagueness because the ordinance is clear to both owners of dogs and others having charge, care, custody or control of a dog that they are strictly liable for the actions of the dog in violation of the ordinance. Because the language of the ordinance is clear, the defendant had adequate notice of the prohibited conduct and the trial judge was correct in applying strict liability to both owners and custodians.[2]

IV. THE TRIAL COURT PROPERLY ALLOWED THE DEFENDANT'S STATEMENT INTO EVIDENCE BECAUSE THE CIRCUMSTANCES IN WHICH THE STATEMENT WAS MADE WERE NEITHER CUSTODIAL NOR INTERROGATIVE.

On December 29, 1988, previous to charges being filed, the defendant filled out a written statement which the plaintiff introduced at trial. Defendant claims that this statement should have been excluded because he was not informed of his Miranda rights. The statement of the defendant introduced into evidence at trial was given under circumstances to which Miranda rights would not apply: the statement was made under conditions which were neither custodial nor interrogative. Miranda v. Arizona, 384 U.S. 436 (1966).

In State v. Shuman, 639 P.2d 155 (Utah 1981), the defendant called his probation officer to report that he thought he might

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[2] The plaintiff's proposed instruction included owners and person having charge, care, custody or control. The trial judge determined that it was necessary to instruct only as to owners and custodians.

have killed someone. Officers arrived at the defendant's apartment to investigate. They found no evidence of a crime, but eventually the defendant was asked to come to the sheriff's office for further investigation. He went there willingly. In response to a question asked by the sheriff, the defendant admitted to having been with the victim and having been in an argument.

Eventually, after further evidence was obtained and the defendant was advised of his Miranda rights he confessed to killing the victim. The defendant sought to suppress his pre-Miranda statements. The Utah Supreme Court held that Miranda was not controlling because the defendant was not in custody, or otherwise deprived of his freedom in a significant way, prior to having been read his rights: he had willingly accompanied the deputy to the sheriff's office; he was not under arrest; he was given no indication that he would be retrained from leaving. Id. at 157.

Similarly, the defendant in the case at hand was not in custody. He came to the office of Sandy City Animal Control after an animal control officer called and asked him to come fill out a witness statement. The appointment was set at the defendant's convenience. Transcript, p. 6. When he arrived, he came freely through the front door to the desk where he filled out the statement. Transcript, p. 16-17. He was not placed under arrest. Transcript, p. 6. And he was never told he could not leave. Transcript, p. 17. Even if the defendant had been a suspect at this time, and is not clear that he was, "a noncustodial situation is not converted to one in which Miranda applies simply because the

questioned person is one whom the police suspect." State v. Cole, 674 P.2d 119, 125 (Utah 1983).

Furthermore, the environment in which the defendant wrote his statement was not interrogative. The officer told the defendant that he was not "obligated to write the statement." Transcript, p. 6. In fact, she give him a partial Miranda warning to stress that he did not have to write the statement. When the defendant expressed some confusion about what to right in the statement, the only guidance the officer offered was "Just write what happened and, you know, who owns the dog and who doesn't own the dog." Transcript, p. 7.

While the defendant was writing the statement, the officer was in the back room "answering phones and such." Transcript, p. 8. The defendant even admitted that he did not write the statement in response to any direct line of questioning: "As she said, I didn't know what to put down and she just said to put something down, so I did." Transcript, p. 15. When the defendant was finished writing the statement he voluntarily gave it to the officer and left. Transcript, p. 8. It would be difficult to argue that these circumstance rose to a level of constitutional protection.

CONCLUSION

The Brief of Appellant should be stricken because is fails to comply with Rule 24 of the Rules of the Utah Court of Appeals. Furthermore, the defendant does not have standing to challenge Sandy City Ordinance 3-1-14 because he has not shown that the ordinance is either vague in all its applications or vague as to

the his conduct. Even if the defendant has standing to challenge section 3-1-14, the ordinance is not vague. Section 3-1-14(a), both by its language and purpose, imposes strict liability on owners and people having charge, care, custody or control of a dog. The trial judge, therefore, was correct in instructing the jury that both owners and custodians were strictly liable. The trial judge was also correct in admitting the statement of the defendant. Based on the foregoing arguments, the plaintiff respectfully requests that the Court of Appeals affirm the judgment of the trial court.

Dated this 14th day of February, 1990.

Respectfully Submitted,

Clifford W. Lark

Clifford W. Lark
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February, 1990 I mailed four copies of the foregoing Brief of Respondent, by certified mail, to:

David K. Smith
Attorney at Law
Suite 280
310 East 4500 South
Salt Lake City, Utah 84107

Clifford W. Lark

APPENDIX

Prosecution's Exhibit No. 7, Witness Statement, Jerry Rooks.

SANDY CITY POLICE DEPARTMENT
598 EAST 9400 SOUTH
SANDY, UTAH 84070 (801) 572-1211

(4)

WITNESS STATEMENT

CONFIDENTIAL
AUTHORIZED FOR LAW
ENFORCEMENT USE ONLY

DATE 12-29-88 TIME OF OCCURRENCE _____ CASE # _____

LOCATION 132E 9400S0

NAME J. Rooks ADDRESS 132E 9400S0

SEX M AGE 1-5-60 TELEPHONE NUMBER 571-9402

DESCRIBE WHAT YOU SAW: I Recived Rebel Aproximtly TWO YEARS AGO. He WAS A full Grown dog AT THE time. When we first GOT him we ATTemted TO REPAIR THE fence Around THE HOUSE, TO NO AVAIL. OUR NEXT ATEMT TO CONTAIN HIM consisted of TIEING him with Rope. from THIS we moved up TO A Ground CABLE. THIS method seemed TO WORK quite well Some time AROUND ~~SEPT~~ SEPT my daughter BECAME HOSPTILized, AND I BECAME QUITE ILL myself. during THIS Time Reble VANISHED, I spent Aprox. A week SEARCHING All SHELTERS' IN THE valley. Rebel could NOT Be located. Aprox. A month & A HALF Reble Returned. AT THIS time, I found A NEW collor AND VET TAG ON SAID dog. I Proceeded TO RESEARCH INFO THROUGH VET TAG. I LEARNED AT THIS TIME THAT Rebel HAD BEEN PICKED UP BY ANIMAL CONTR AND THEN IN TURN HAD BEEN Adopted By

(5)

SANDY CITY POLICE DEPARTMENT
598 EAST 9400 SOUTH
SANDY, UTAH 84070 (801) 572-1211

WITNESS STATEMENT

DATE _____ TIME OF OCCURRENCE _____ CASE # _____

LOCATION _____

NAME J. Rooks ADDRESS 132 E 9400 S

SEX _____ AGE _____ TELEPHONE NUMBER (W) 571-9402

DESCRIBE WHAT YOU SAW: ONE JANICE Molden. I THEN contacted JANICE AND informed HER THAT Rebel Had showed up. I Also found OUT THAT He Had Been spayed. ~~Rebel seemed to have lost his wanderlust desire.~~ We Had him Aprox. [illegible] ~~one and a half mo. at this time.~~ ~~He was left in the yard.~~ We Assumed THAT spaying him Had kept him Home. ~~He never had a problem Again until 12-23-88 at~~ WITCH TIME ~~he escaped.~~ I WAS THEN contacted By JANICE, THEN SANDY CITY Animal control. And informed of said INSEDENT.

J. Rooks

JERRY WAS ADVISED OF HIS RIGHTS ~~AND THAT THIS STATEMENT WOULD BE USED~~ ~~TO EVIDENCE~~

CONFIDENTIAL
AUTHORIZED FOR LAW
ENFORCEMENT USE ONLY